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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,
v.
FEDERICO PEÑA,
Secretary of Transportation, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE CONGRESSIONAL ASIAN PACIFIC AMERICAN CAUCUS AND THE NATIONAL URBAN LEAGUE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The Congressional Asian Pacific American Caucus ("CAPAC") was established to ensure that legislation passed by the United States Congress, to the greatest extent possible, provides for the full participation of Asian Pacific Americans and reflects the concerns and needs of the Asian Pacific American communities. In addition, CAPAC works with other Members and Caucuses of the Congress to protect and advance civil and Constitutional rights of all Americans.

The National Urban League's ("League") general purposes are, among others, to improve the living and work-

ing conditions of African Americans and other similarly disadvantaged minorities and to foster better race relations. Moreover, the League and its affiliates seek to assist minority-owned businesses by increasing their opportunities within the mainstream of the American economy.

SUMMARY OF ARGUMENT

This case presents yet another question involving race. Unfortunately, the power of reason has not been employed to analyze this sensitive issue. Monuments of the failure to utilize reason are well documented in *Dred Scott v. Sanford*, 60 U.S. (19 Howard) 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943) and *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). In each instance, these pragmatic decisions failed to adequately reflect the simple ideal embodied in *The Declaration of Independence*—"that all men are created equal."[1] The Tenth Circuit's application of this Court's decisions in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), not only attempts to finally bring principled reason to bear on such a sensitive issue, but also reflects, as best as possible, reasons that are consistent with the principle of federalism and an adherence to the Constitution's egalitarian ideals.

This Court's application of strict scrutiny to benign racial classifications is premised upon Justice John Marshall Harlan's admonishment that the Constitution is colorblind. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). Yet, "[a colorblind Constitution] is a tradition without a past."[2] American history and American jurisprudence

[1] *The Declaration of Independence* para. 2 (U.S. 1776) provides: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

[2] William T. Coleman, Jr., *Equality—Not Yet*, N.Y. Times, Jul. 13, 1981, at A15, Col. 2.

do not suggest that the concept of colorblindness is embodied in the Constitution. Indeed, the *Plessy* decision itself, which was the law of the land for fifty-eight (58) years, did not reflect Constitutional colorblindness. The willing adoption, at this point in time, of a colorblind principle reflects what is amiss with Constitutional doctrine addressing race and equal protection methodology. In every instance when the law impacts race relations, the decisions reflect rationale that is not rooted in the *rule of law*,[3] but unfortunately reflect "pragmatic political judgments sensitive to the times."[4] *Bakke*, 438 U.S. at 299 (Powell, J., concurring) (quoting Archibald Cox, *The Role of the Supreme Court in American Government* (1976)). As such, the application of strict scrutiny to benign racial classifications reflects more the emotion of the popular will, than a doctrine influenced by the fidelity to federalism and the *rule of law*.

The concept of strict scrutiny, which was first enunciated by Justice Black in *Korematsu v. United States*, 323 U.S. 214 (1944), was developed as an analytical tool to ferret out the seeds of rank discrimination, discrimination that was motivated by the view that a particular group was inferior, obnoxious, and odious. The doctrinal roots of strict scrutiny can be traced back to Justice Stone's footnote four of the *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). In that footnote, Justice Stone expressed that classifications based on race require more searching judicial inquiry to protect "discrete and insular minorities." *Id.* Strict

[3] Since the *rule of law* is susceptible to different meanings, we define the *rule of law* as the idea that the law, which reflects values that appeal to the principles embodied in *The Declaration of Independence*, will be applied impartially regardless of the will of the majority, whomever the majority may be.

[4] This Court must remember that "this is a country of law and not of men. Without that fundamental principle, our country could not survive." *National Treasury Employees Union v. Reagan*, 509 F. Supp. 1337, 1342 (D.D.C. 1981).

scrutiny was thereby not intended to be applied to legislation benefitting "discrete and insular minorities" on a national level. *Id.*

Interestingly, *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which did not apply strict scrutiny to Congressionally mandated racial classifications, implicitly reflected Justices Black's and Stone's understanding, as well as James Madison's view, that minorities need protection from the excesses of popular will. One of the most difficult problems in a democracy is to protect the minority from the excesses of the majority. This was a problem discussed by one of the Founding Fathers, James Madison, in *The Federalist*. In *The Federalist*, James Madison recognized that a national legislature is much better positioned to protect the minority from the excesses of the majority, because Congress is answerable to a large constituency. Indeed, because the statute before this Court has been developed by Congress, the principles of federalism would preclude the application of strict scrutiny to this statute.

Assuming this Court decides that strict scrutiny is the proper standard to apply to Congressionally mandated racial preferences, the *Croson* standard will effectively doom most legislation dealing with such preferences. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Croson*, particularly in light of its application by the lower courts, necessitates the use of statistics to demonstrate a compelling governmental interest. Indeed, the level of statistics required to demonstrate a compelling governmental interest is incompatible with the national legislative process. In sum, the present standard of proof required by *Croson* is impractical for Congress.

ARGUMENT

I. FUNDAMENTAL FIFTH AMENDMENT EQUAL PROTECTION PRINCIPLES DEVELOPED BY THIS COURT OVER THE PAST FIFTY YEARS DO NOT COMPEL THAT STRICT SCRUTINY BE USED TO EVALUATE RACIAL PREFERENCES SANCTIONED BY CONGRESS PARTICULARLY WHEN CONGRESS ACTS PURSUANT TO ITS SPECIAL POWERS UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT

Introduction

In 1901, W.E.B. DuBois wrote in *The Souls of Black Folk* that "the problem of the Twentieth Century is the problem of the color-line." [5] Indeed, his observation was merely a reflection of what has been a problem of this Country from its founding. *See, e.g., Crandall v. State*, 10 Conn. 339 (1834) (holding, prior to *Dred Scott v. Sanford*, that neither Indians nor free Negroes were citizens within meaning of the Constitution). For a considerable number of years, this Court, the lower federal courts, the states, and the national legislature have been forced to reconcile slavery and subservience with the Constitution's egalitarian ideals. The experience has not been a happy one. Representative of this Court's attempt to address this American dilemma are: *Dred Scott v. Sanford*, 60 U.S. (19 Howard) 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*); *Hirabayaski v. United States*, 320 U.S. 81 (1943); and *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). A persistent and nagging theme common to these and other decisions is not only the failure of these decisions to establish Constitutional doctrine that reflect the ideal embodied in Thomas Jefferson's *The Declaration of Independence* that "all men are created equal," [6] but also a lack of adherence to the precept of *blind justice*.

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[5] W.E.B. DuBois, *The Souls of Black Folk*, 5 (1903).

[6] *The Declaration of Independence* para. 2 (U.S. 1776).

The color-line dilemma continues to plague this Court, and is reflected in its numerous plurality decisions. *See, e.g., Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). Unfortunately, the lack of a coherent Constitutional doctrine addressing the color-line problem has allowed the Petitioner and its *amici* to exploit this void before the Court. Out of this confusion, the Tenth Circuit's application of this Court's decisions in *Metro Broadcasting* and *Fullilove* attempts, as best as possible, to finally bring principled reason to bear on such a sensitive issue and to reflect efforts to reach for reasons consistent with the principles of federalism, the *rule of law*, and history.[7]

Strict scrutiny, unlike an intermediate level of scrutiny, when applied to benign race conscious programs enacted by Congress, does not appropriately reflect the Fifth and Fourteenth Amendments, the demands of federalism, and the legacy of racial discrimination. To the contrary, strict scrutiny would compel constant straining of the Constitution, not by applying concrete fundamental principles, but by the corrosive and annoying process of con-

[7] Given this Court's use of history in reasoning in other areas of Constitutional law, this Court should not now feel hesitant to continue that tradition in the equal protection context. *See generally Lucas v. South Carolina Coastal Council*, —— U.S. ——, 112 S. Ct. 2886 (1992) (using history to show, in takings context, that state traditionally did not compensate individuals for property taken for public use); *Edwards v. Aguillard*, 482 U.S. 578, 605 (1987) (stating that history must be taken into account in interpreting First Amendment); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 646 (1989) (Stevens, J., concurring) pointing to history of subsidiary of national churches). *But see Podberesky v. Kirwan*, No. 93-2527, No. 93-2585, 1994 U.S. App. LEXIS 29943 at *12 (4th Cir. Oct. 27, 1994) (belittling the district court's use of history stating that, "as long as there are people who have access to history books, there will be programs such as this one").

stant review. As a result, the application of strict scrutiny, as an equal protection doctrine evaluating Congressional affirmative action programs, would continue to produce a series of *ad hoc* and inconsistent decisions, which would only exacerbate the race problem.

A. The application of strict scrutiny to Congressionally sanctioned benign racial classifications is premised upon a false postulate that the Constitution is colorblind

The Petitioner and its *amici* argue that existing Constitutional jurisprudence compels the application of strict scrutiny to Congressional programs.[8] Brief of Petitioner at 24-28; Brief of PLF at 6-24; Brief of ALF at 4-11; and Brief of AGCA at 6-27. To reach this conclusion, Petitioner and its *amici* seek to limit the scope of the two cases, *Metro Broadcasting* and *Fullilove*, in which this Court has had the opportunity to address the issue. Brief of Petitioner at 24-28; Brief of PLF at 6-24; Brief of ALF at 4-11; and Brief of AGCA at 6-27. Notwithstanding the Petitioner's and its *amici's* attempt at distinguishing *Metro Broadcasting* and *Fullilove* and importing *Croson* to their aid, their position is without principled reason in law and inconsistent with decisions of this Court. Both have incorrectly advanced that *Croson* settled once and for all the principle that strict scrutiny should be applied to all racial preferences—regardless of whether the burdened individuals belong to a group that has been subject to historic discrimination and regardless of which legislature enacted the program. Brief of Petitioner at 32; Brief of PLF at 13-29; Brief of ALF at 9-12; and Brief of AGCA at 8-16.

[8] Brief of Petitioner Adarand Constructors, Inc. (hereinafter cited as "Brief of Petitioner"); Brief of Atlantic Legal Foundation (hereinafter cited as "Brief of ALF"); Brief of Pacific Legal Foundation (hereafter cited as "Brief of PLF"); and Brief of The Associated General Contractors of America, Inc. (hereinafter cited as "Brief of AGCA").

In a tremendous effort to extricate itself from precedent and principles previously established in Constitutional jurisprudence, nearly twenty years ago, a plurality of this Court incautiously decided that the Constitution is colorblind. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, Justice Powell, for a plurality, seemed to suggest that, because the Constitution is colorblind, strict scrutiny should apply to all racial classifications whether benign or invidious. *Bakke*, 438 U.S. at 291-300 (Powell, J., concurring). There is no doubt that questions touching upon race present the single most difficult issue confronting the Court. Consequently, the need to advance a colorblind principle of Constitutional law is not only appealing for its structural elegance,[9] but because it appeals to the best of our democratic ideals. Yet, "[a colorblind Constitution] is a tradition without a past." [10]

The application of strict scrutiny to benign racial classifications sanctioned by Congress is predicated upon the postulate that the Constitution is colorblind. This postulate, which was first suggested by Justice John Marshall

[9] "Principled decisions are those that rest on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." *Compare* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 119 (1959) *with* Arthur Miller and Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. Chi. L. Rev. 661, 676 (1960); Addison Mueller and Murrall O. Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A. L. Rev. 571 (1960); Jan Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 Stan. L. Rev. 169 (1968); Charles E. Clark, *A Plea for the Unprincipled Decision*, 49 Va. L. Rev. 660 (1963); G. Edward White, *The Evolution of Reasoned Elaboration Jurisprudential; Criticism and Social Change*, 59 Va. L. Rev. 279 (1973); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency In Judicial Review*, 64 Colum. L. Rev. 1 (1964); *and* Benjamin Andrew Zelermyer, *Benjamin N. Cardozo: A Directive Force in Legal Science*, 69 B.U. L. Rev. 213, 219 (1989).

[10] William T. Coleman, Jr., *Equality—Not Yet*, N.Y. Times, Jul. 13, 1981, at A15, Col. 2.

Harlan in his dissent to *Plessy v. Ferguson*, 163 U.S. at 557, is not only contrary to the history of this Country, but is not reflected in the Constitutional jurisprudence by this Court. *See, e.g., Dred Scott v. Sanford*, 60 U.S. (19 Howard) 393 (1857); *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*); *see also* Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (1944). These cases established Constitutional principles that were consistently influenced by the color-line. *See, e.g., Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding state authority to exclude child of Chinese ancestry from "white" schools because equal facilities were provided for non-whites). Indeed, it was because of a history of Constitutional interpretation that was influenced by the color-line that Justice Black in *Korematsu v. United States*, 323 U.S. 214 (1944) and Justice Stone in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), recognized that racial classifications against minorities required judicial scrutiny. Until *Bakke*, and to a certain extent in *Defunis v. Odegaard*, 416 U.S. 312 (1974) (*per curiam*), racial classifications were applied to exclude racial minorities from the full benefits of society. In sum, the reason that racial classifications deserve this Court's most searching scrutiny is because history has amply demonstrated that political majorities will exact a toll on racial minorities.[11] History, however, would not suggest that political majorities would invidiously discriminate against themselves. James L. McAlister, *Comments: A pigment of the Imagination: Looking at Affirmative Action through Justice Scalia's Colorblind Rule*, 77 Marq. L. Rev. 327, 351, 353 n.209, *citing* John Ely, *The Constitutionality of Reverse Discrimination*, 41 U. Chi. L. Rev. 723, 727, 735 (1974).

[11] As James Madison observed, when contemplating how to curb the excesses at the majority for this new country, "[w]e have seen the mere distinction colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man." James Madison, June 6, 1787, *Notes of Debates in the Federal Convention of 1787*, 76-77.

The legacy of racism persists despite the efforts of the law to dictate otherwise. When the Thirteenth, Fourteenth, and Fifteenth Amendments were adopted,[12] they did not, with the blink of an eye, eliminate racism. When *Brown v. Board of Education,* 347 U.S. 483 (1954), reversed the "separate but equal" principles of *Plessy,* this Court did not destroy the notion that African Americans and other insular and discrete minorities were inherently inferior. As Alexis de Tocqueville observed, long before slavery was abolished, "[a] natural prejudice leads a man to scorn anybody who has been his inferior, long after he has become his equal; the real inequality . . . is always followed by an imagined inequality rooted in mores." Alexis de Tocqueville, *Democracy in America* 341 (G. Lawrence trans., J. Mayer ed. 1969); *see also* William T. Coleman, Jr., *A Bicentennial Celebration of the Constitution: The Third Circuit Judicial Conference in Philadelphia: Federalism, The Great Vague Clauses and Judicial Supremacy: Their Constitutional Role in the Liberty of a Free People,* 49 U. Pitt. L. Rev. 699, 709 n.49 (1988) (discussing effects of racism). In other words, inequality and disadvantage do not end simply because this Court declares that the Constitution is colorblind. As the great jurist J. Skelly Wright observed, "to abruptly retreat ot the abstract ground of high principle in face of the reality is to ignore the fact that this nation has irrevocably rejected the strict colorblind theory of government." J. Skelly Wright, *Colorblind Theories and Color-Conscious Remedies,* 47 U. Chi. L. Rev. 213, 220 (1979).

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[12] Justice O'Connor recognized the context in which these amendments were enacted, when she stated that:

> The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race. Speaking of the Thirteenth and Fourteenth Amendments in Ex parte Virginia, 100 U.S. 339, 345, 25 L. Ed. 676 (1880), the Court stated: 'They were intended to be, what they really are, limitations of the powers of the States and enlargement of the Power of Congress.'

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989).

This Court's decisions in *Bakke, Fullilove, Wygant, Croson,* and *Metro Broadcasting* all reflect the tension of a genuine attempt to grapple with the race problem honestly and as forthrightly as possible given the convergence of precedent and history while recognizing that "there is little in our jurisprudence to date that will guide us in . . . [the area of affirmative action]." *Id.* at 232. In *Bakke,* a tie between two four-Justice coalitions was broken by Justice Powell who voted to invalidate the minority admissions quota but recognized the use of race conscious programs. *Bakke,* 438 U.S. at 319-20. In *Fullilove,* the Court broke into three groups with three Justices setting the prevailing view by voting to uphold a race conscious program. *Fullilove,* 448 U.S. at 453-92. In *Wygant,* only a plurality could agree on the reason to strike down a race based plan to lay off public school teachers. *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 269-84 (1986). In *Croson,* "one of the most complex scorecards of the history of the Court," [13] was decided only after much division between the Justices. In *Metro Broadcasting,* this Court tried to utilize principled reason when it recognized that strict scrutiny was not the proper standard, but again the Court spoke through a plurality opinion.

Justice Oliver Wendell Holmes observed in his book *The Common Law* that: "the life of the law has not been logic: it has been experience." Oliver W. Holmes, *The Common Law* 1-2 (1881). The application of strict scrutiny to benign racial classifications, particularly when enacted or sanctioned by Congress, does not truly reflect the experience of the law on this issue. The experience of American law has revealed that racial classifications have been used, as recognized by Justice Stone in *Carolene Products Co.,* 304 U.S. at 152 n.4, by political majorities against minorities. As such, the application of strict scrutiny in the context of Congressional affirmative action programs is without historic support.

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[13] Thomas Ross, *The Richmond Narratives,* 68 Tex. L. Rev. 381, 395 (1989).

Indeed, because strict scrutiny was developed under a different set of circumstances, its value as a principle of equal protection doctrine for application to benign racial classification is significantly diminished, particularly at the Congressional level. Harvard Law Professor Wechsler defined a principle as "one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 19 (1959). The corruption of a principle occurs when *ad hoc* and constant defining and redefining of the principle occurs within a relatively short period in history. *Id.* at 21-35; *see also* Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 Harv. L. Rev. 673, 737 (1963). Strict scrutiny was developed to protect minorities. *Korematsu v. United States*, 323 U.S. 214 (1944); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). Conceptually, as a principle, strict scrutiny makes good judicial and political sense. It reflects historical reality, and it reflects ideals that date back from the inception of this Country. *See The Federalist*, Nos. 10, 51 (James Madison) (Sesquicentennial ed. 1937); Robert A. Burt, *The Constitutional Conflict*, 36-47 (1992). Given that strict scrutiny stands on such firm foundation, it proved exceedingly useful in "smok[ing] out" the illegitimate uses of race by political majorities. *Croson*, 488 U.S. at 506. Taken out of this context, however, strict scrutiny loses all value as a neutral principle of general application, particularly as it relates to advancing the idea of a colorblind Constitution.

The application of strict scrutiny as a principle of equal protection to benign racial classifications enacted by Congress can only accomplish three purposes: (i) rob the idea of a colorblind Constitution of its intrinsic value; (ii) rob the application of exacting judicial scrutiny of racial classifications of its meaningful value within the context of addressing the excesses of political majorities; and (iii) perpetuate the lingering legacy of a color conscious Constitution.

B. The demands of federalism preclude the application of strict scrutiny to Congressionally sanctioned benign racial classifications

This Court's rejection of the application of strict scrutiny in *Metro Broadcasting* and *Fullilove* is an expression of the concepts of federalism within the context of the equal protection clause. This expression is further amplified when one considers the *Metro Broadcasting* and *Fullilove* decisions in light of this Court's decisions in *Bakke*, *Wygant*, and *Croson*. The apparent distinction between the latter three cases and the *Metro Broadcasting* and *Fullilove* cases is that this Court has implicitly recognized there must be a stricter equal protection review of state and local action than that of Congress, which can act to remedy past discrimination pursuant to section 5 of the Fourteenth Amendment. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966). Justice O'Connor and Justice Powell have expressly recognized this distinction in *Croson* and *Bakke* respectfully. *Croson*, 488 U.S. at 490 ("Congress, unlike any other state or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment . . . to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations"); *Bakke*, 438 U.S. at 302 ("We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures").

Directly applicable to the issues before the Court, Justice Scalia, in his concurring opinion in *Croson*, recognized the concept of federalism in an equal protection analysis of benign racial classifications drawn by Congress. In *Croson*, Scalia said that a "sound distinction between federal and state (or local) action based on race rest not only upon . . . [the plain language of the first and fifth sections of the Fourteenth Amendment] but upon social reality and governmental theory." *Croson*,

488 U.S. at 522 (Scalia, J., concurring). Justice Scalia further advanced a view wholly compatible with James Madison's view by stating "that racial discrimination against any group finds a more ready expression at the state and local level rather than at the federal level." *Id.* at 523. This view was clearly articulated by James Madison in *The Federalist*. *The Federalist*, Nos. 10, 51 (James Madison) (Sesquicentennial ed. 1937). At the heart of the Madisonian principle is an understanding that federalism would help avoid one of the central problems of democracy—the prospensity of popular governments to resolve conflicts "not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." [14] Thus, Madison's grappling with the issue of treatment and protection of the minority by the majority within the context of the democratic process [15] has great meaning for an equal protection analysis.

The judgments of Congress, as opposed to those of a local or a state legislature, are entitled to particular deference, because Congress is the Constitutional equal of this Court. Moreover, as a large and popularly elected body, Congress mirrors the national will—a consideration of importance in a country founded upon the sovereignty of the people. Judicial restraint, therefore, in the review of federal statutes follows naturally from the realization that courts "are not representative bodies. They are not designed to be a good reflex of a democratic society." *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring); *see* Learned Hand, *The Bill of Rights* 11-18 (1958); Alexander M. Bickel, *The Least Dangerous Branch* (1962).

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[14] *The Federalist*, No. 10, at 54 (James Madison) (Sesquicentennial ed. 1937).

[15] *The Federalist*, Nos. 10, 51 (James Madison) (Sesquicentennial ed. 1937).

In reviewing civil rights legislation, this Court has often recognized "the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures." *Bakke*, 438 U.S. at 301 n.41 (Powell, J.); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968); *Katzenbach v. Morgan*, 384 U.S. at 648-653; *South Carolina v. Katzenbach*, 383 U.S. 301, 326-27 (1966); *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964). This Court is to give judicial deference to the edicts of the political democracy absent some justifiable reason to ignore the decisions of the populace. The Court's basis for stepping into the political arena to make adjustments has been where the political process was perverted and used to the detriment of a "discrete and insular" minority whom was unable to protect itself from the tyranny of the majority. *Carolene Products Co.*, 304 U.S. at 152 n.4.

The language of the Fourteenth Amendment clearly limited the authority of the state and not Congress—an implicit recognition of the Madisonian concept of the democratic principles of this Country.[16] U.S. Const. amend. XIV, § I. The basis for failing to limit Congress' authority seems quite reasonable, since the federal government, which is answerable to a large constituency, exerts a broader spectrum of power than a state, and thus may be immune to more discrete and parochial interests and concerns.[17] This Court has recognized that Congressionally mandated actions deserve greater deference because such acts are subject to the equal pro-

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[16] "Madison, by arguing that a large republic would best protect minorities, rejected requirements of homogeneity, egalitarianism, and smallness." Notes, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 Yale L.J. 1403, 1405 n.5 (1982) (citations omitted).

[17] *See generally The Federalist*, No. 10, at 60 (James Madison) (Sesquicentennial ed. 1937).

tection component of the due process clause of the Fifth Amendment. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). In fact, this Court has required that the Congressional goal underlying race conscious remedies "must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity." *Fullilove*, 448 U.S. at 463.

As espoused by Justice Holmes, this Court has approached Congressionally mandated acts under the guise of the "gravest and most delicate duty that this Court is called on to perform." *Fullilove*, 448 U.S. at 472, *citing Blodgett v. Holden*, 275 U.S. 142, 148, *modified by* 276 U.S. 594 (1927). Following that edict, this Court stated "we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general welfare of the United States.' . . . [W]e accorded . . . 'great weight to the decisions of Congress' even though the legislation implicated fundamental constitutional rights. . . . The rule is not different when a congressional program raises equal protection concerns." *Fullilove*, 448 U.S. at 472 (citations omitted).

The application of strict scrutiny to state and local legislation is consistent with the Madisonian concept that state and locally sponsored race conscious programs may require some heightened scrutiny. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980). This understanding clearly reflects the Court's divergent treatment between the two governmental entities. Under section 5 of the Fourteenth Amendment, Congressional acts mandated by the Constitutionally chartered body deserve greater deference because Congress is charged with the enforcement of the equal protection clause as applied to the states.[18] U.S. Const. amend. XIV, § 5.

[18] Section 5 of the Fourteenth Amendment states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

II. IN ANY EVENT, THE APPLICATION OF STRICT SCRUTINY AS DEVELOPED BY THIS COURT UNDER *CITY OF RICHMOND v. J.A. CROSON* IS IMPRACTICAL FOR A NATIONAL LEGISLATIVE BODY CONFRONTED WITH THE NEED TO UTILIZE BENIGN RACIAL CLASSIFICATIONS

A. Statistics of the type demanded by *Croson* are incapable of comprehending discrimination on the scale contemplated by national racial preferences

As documented by scholars, history is clear - discrimination against racial minorities in this country has resulted in vast inequalities which remain today. *See* Cornel West, *Race Matters* (1993); Paul M. Sniderman and Thomas Piazza, *The Scar of Race* (1993). Congress' powers through section 5 of the Fourteenth Amendment authorize this body to enact remedial legislation to correct the evils of invidious discrimination for the good of our democratic society. Thus, deference has been accorded to Congress to rectify discrimination.

Affirmative action programs are most often designed "to remedy the present effects of past discrimination." *Wygant*, 476 U.S. at 280 (quoting *Fullilove*, 448 U.S. at 480 (opinion of Burger, C.J.)). Legislatures enacting these programs seek to remedy existing disparities such that they recognize that a system grounded in preventive measures alone cannot overcome the pervasive effects of the history of racism.[19] Robert Allen Sedler, *Beyond*

[19] By implementing affirmative action programs, legislature apparently recognize that "You do not take a person who, for years, has been hobbled by chains and liberate him, bringing him up to the starting line of a race and then say, 'You are free to compete with all the others,' and still justly believe that you have been completely fair." George R. LaUoue and John Sullivan, Esq., *"But For" Discrimination: How Many Minority-Owned Businesses Would There Be?*, 24 Colum. Hum. Rts. L. Rev. 93, 96 (1992-93), *citing* President Lyndon B. Johnson, Commencement Address at Howard University (June 4, 1965), *cited in In the Eyes on the Prize: Civil Rights Reader* 613 (Clayborne Carson et al. eds. 1991).

Bakke: The Constitution and Redressing Social History of Racism (1979) (concluding that "the present system of prevention has not and cannot overcome the persistent efforts of our long and tragic history of racism"). These programs attempt to meet the recognition that, "absent explanation, it is ordinarily expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."[20] *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977), *cited in Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977).

Statistics do not lend themselves to comprehending the breadth of a national affirmative action program. Appreciating the limitations of statistics, particularly at the national level, requires appreciating the scope of the problem facing minority-owned businesses. It has, for some time now, been widely recognized that minority businesses are not an integral part of America's free enterprise system.[21] For example, African-American owned enterprises constitute approximately 3% of all U.S. businesses and 1% of all U.S. revenues. Laura Everson and Carl T. Hall, *How Black Firms are Fairing, Minority Businesses Still Struggling To Get Into Economic Mainstream*, S.F. Chronicle, May 11, 1992, at B1. Indeed, racial discrimination in American commerce was an integral part of the system and is heavily documented. Booker T. Washington and W.E.B. DuBois were early comentators on the issue. Booker T. Washington. *The Negro, and The Labor Unions*, Atlantic Monthly, Jul. 1913, at 756-767; W.E.B.

[20] *Cf. Maryland Troopers Ass'n, Inc. v. Evans*, 993 F.2d 1072 (4th Cir. 1993) (finding that "[i]nferring past discrimination from statistics alone assumes the most dubious of conclusions: that the true measure of racial equality is always to be found in numeric proportionality").

[21] *See, e.g.*, Summary of Activities of the Committee on Small Business, 94th Congress, 2d Sess. 182-83 (1976).

DuBois, *The Economic Future of the Negro* (1906) at 219-42; Sterling D. Spero and Abram Harris, *The Black Workers* (1931); Ray Marshall *The Negro in Organized Labor* (1965); W.E.B. DuBois, *Against Racism: Unpublished Essays, Papers, Addresses 1887-1991* (1983).

One cannot lose sight of the fact that affirmative action programs are designed to mitigate and rectify the discriminatory evils of the past and present in a manner that increases minority participation in the economy of our democratic society. To require nationally mechanistic statistical analyses from Congress is Herculean. Applying *Croson* to the statute at issue would in essence foreclose many Congressionally mandated affirmative action programs. Not only is the task of justification and statistical vertification of discrimination nearly impossible to accomplish, some sources of covert racism and discrimination allude capture by statistics. Indeed, Petitioner and its *amici* have spent a considerable amount of argument demonstrating the inherent problems of refining statistics. Furthermore, it is evident that not all social and economic disparities can be identified as race-neutral. Thus, this Court should recognize the purpose of Congress' remedial acts, as well as the practical limitations of a national legislative body, when considering the application of strict scrutiny.

B. The scope of statistics required by *Croson* are impractical for a national legislative body

The Constitution does not require that a legislature conduct hearings, build a record, and make formal findings when it passes a law. *Perez v. United States*, 402 U.S. 146, 156-57 (1971); *Oregon v. Mitchell*, 400 U.S. 112, 147 (1970) (Douglas, J., concurring in part and dissenting in part); *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937); *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). As Professor Cox has noted, "[t]he Court does not review the suffi-

ciency of the evidence in the record to support congressional action . . . and the practice of relying upon the legislative record when it exists should not be taken to show that such a record is required." Archibald Cox, *The Supreme Court, 1965 Term-Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 105 (1966).

This basic separation of powers principle is embodied in the Constitution's grant to Congress of the power to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5. The courts, far from requiring a detailed legislative history or findings, have "long been committed both to the presumption that facts exist which sustain congressional legislation and also to deference to congressional judgment upon questions of degree and proportion." Cox, *supra* 21, at 107. The relevant cases support this analysis; they uniformly hold that a statute "will not, be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *James v. Strange*, 407 U.S. 128, 133 (1972).

Croson recognized that Congress is assigned the duty to remedy society-wide discrimination. *Croson*, 488 U.S. at 490; *Coral Constr. Co. v. King County*, 941 F.2d 910, 925 (9th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 875 (1992); *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 374 (1992), *citing Fullilove*, 448 U.S. at 478. As such, Congress is not required to make the same particularized findings as are the states for every affirmative action statute that it passes. Moreover, Congress is not required to make specific findings of past discrimination where it has an abundant historical basis upon which to ground its legislation. *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992), *citing Fullilove*, 448 U.S. at 478. "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove*, 448 U.S. at 503 (Powell, J., concurring). Thus, the "joint

lesson of *Fullilove* and *Croson* is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do." *Milwaukee County Pavers Ass'n v. Fielder*, 922 F.2d 419 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991); *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969 (6th Cir. 1991). Accordingly, although the Court may require Congress to demonstrate historical discrimination against minorities in order to justify a program of affirmative action, it is impractical to require Congress to meet the strict requirement of detailed statistics established by *Croson*.

Furthermore, if the Court requires Congress to utilize a *Croson* statistical analysis to justify race conscious legislation, many Congressional programs would never come into being, because of the difficulty and costs involved in completing the requisite studies necessary for a program intended to reduce the effects of discrimination on a national basis. *Cf. Long v. City of Saginaw*, 911 F.2d 1192 (6th Cir. 1990) (finding of unconstitutionality because defining statistical pool as "protective services" is too all encompassing and fails to look at age, education, fitness, and other attributes); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992) (concluding state affirmative act unconstitutional); *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 875 (1992) (finding county set-aside program unconstitutional); *Podberesky v. Kirwan*, No. 93-2527, No. 93-2585, 1994 U.S. App. Lexis 29943 (4th Cir. Oct. 27, 1994) (finding university's scholarship program unconstitutional); *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207 (4th Cir. 1993) (concluding city promotion policy unconstitutional); *United Black Firefighters Ass'n v. City of Akron*, 976 F.2d 999 (6th Cir. 1992) (finding consent decree regarding hiring procedures unconstitutional); *Black Fire Fighters Ass'n of*

Dallas v. City of Dallas, 19 F.3d 992 (5th Cir. 1994) (finding consent decree regarding promotion plan unconstitutional); *Cunico v. Pueblo School Dist. No. 60*, 917 F.2d 431 (10th Cir. 1990) (finding hiring decision unconstitutional).

The statistical burden Petitioner and its *amici* seeks this Court to place on Congress is senseless and insurmountable. Petitioner and its *amici* would require the federal government to map each political subdivision of the United States for every job category imaginable with respect to historical and contemporary discrimination. Brief of Petitioner at 34-41; Brief at ALP at 13-29; Brief of PLF at 24-28. For example, the Pacific Legal Foundation states that:

> Section 5 authority is lacking in this case because neither Colorado nor any political subdivision within Colorado has been shown to have engaged in discrimination in the highway construction industry.

Brief of PLF at 27-28. If Congress is required to act within these constraints, it will be rendered impotent given that the task of Congress to comprehend discrimination on a national scale is daunting, and would result in hundreds of hearings and studies, costing millions of dollars. *See, e.g.*, George R. LaNovu, and John Sullivan, Esq., *"But For" Discrimination How Many Minority-Owned Businesses Would There Be?*, 24 Colum. Hum. Rts. L. Rev. 93, 99 (1992-93) ("By March 1991, 29 state and local jurisdictions had completed some sort of post-*Croson* MBE study at a total cost over $5,491,162. The Minority Business Enterprise Legal Defense and Education Fund, Inc. also reported that another 37 studies were underway at costs totalling over $7,029,929."); Martin Katz, *The Economics of Discrimination: The Three Fallacies of Croson*, 100 Yale L.J. 1032 (1991); James E. Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 Iowa L. Rev. 901, 933-39 (1985).

Furthermore, Congress does not function in a manner that lends itself to the multiplicity of tasks required by *Croson*. Congress would need to hire sociologists, statisticians, and other professionals to undertake the statistical analyses necessary to comprehend the impact of discrimination on particular industries on a national level. *See* George R. LaNovu and John Sullivan, Esq., *"But For" Discrimination How Many Minority-Owned Businesses Would There Be?*, 24 Colum. Hum. Rts. L. Rev. 93, 99 (1992-93); Martin Katz, *The Economics of Discrimination: The Three Fallacies of Croson*, 100 Yale L.J. 1032 (1991); James E. Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 Iowa L. Rev. 901, 933-39 (1985). Such a standard is not only impractical, but it also inappropriately imposes a unique and undue burden on federal legislation designed to remedy the effects of past discrimination. Given the egalitarian goals associated with such programs along with the greater deference provided to Congress, it defies Constitutional jurisprudence to require affirmative action programs to meet a higher standard of statistical certitude and burden than any other legislation passed by Congress.

In order to uphold affirmative action programs, *Croson* requires that the affected industry be statistically broken down into its smallest segments of trade and profession in order to analyze and decide whether there is discrimination against individuals in all of those positions. *Croson*, 488 U.S. at 501-02; *Hazelwood School Dist.*, 433 U.S. at 308. Importantly, the Small Business Administration's categorizing of U.S. industry—the Standard Industrial Classification ("SIC") codes—encompasses seven pages of single space delineation in the Code of Federal Register of various job categories to be examined. 13 C.F.R. § 121.601. A *Croson* analysis on the federal level would require Congress to investigate the discriminatory practices in each of these job categories for programs promoting economic diversity. Such a requirement is an

impossible task, and ensures that the economy will be unduly dominated by majority-owned established businesses at the expense of minority-owned businesses.

Moreover, to require a mechanistic statistical analysis of Congress as a prerequisite to upholding its legislation is inapposite to the intent of the Fourteenth Amendment. *See Fullilove v. Klutznick*, 488 U.S. 488 (1988); *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990). The goal of section 502 is to better the economy of this Country by freeing up more resources presently kept down by discrimination, and in the process remedy the effects of discrimination. 15 U.S.C. § 361. By the imposition of major expenses on a national entity attempting to establish such a program, the legislature will most likely conclude that the most cost-effective measure is to simply allow racism to flourish, an intolerable result. Accordingly, the proposal to require Congress to meet the comprehensive use of statistics established by *Croson* should be rejected.

To advance a democratic society, Congress has and must be allowed to continue to ensure that all citizens are integrated into this society politically, socially, and economically. The Fourteenth Amendment provides Congress with such power; thus this Court must not limit Congress' power by imposing the nearly impossible—national studies of discrimination using a *Croson* standard of statistically vertification. Accordingly, it is impractical and against sound reasoning to impose a *Croson* statistical requirement on the United States Congress.

CONCLUSION

For the reasons stated, this Court should affirm the Tenth Circuit's interpretation of this Court's decisions in *Metro Broadcasting* and *Fullilove*.

Respectfully submitted,

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